

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re NICHOLAS G., a Person Coming
Under the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MICHAEL D.,

Defendant and Appellant.

E035330

(Super.Ct.No. SWJ000748)

OPINION

APPEAL from the Superior Court of Riverside County. Robert W. Nagby,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

William E. Drake, under appointment by the Court of Appeal, for Defendant and
Appellant.

William C. Katzenstein, County Counsel, and Julie A. Koons Jarvi, Deputy
County Counsel, for Plaintiff and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minor.

Following a hearing pursuant to Welfare and Institutions Code section 366.26,¹ the juvenile court terminated the parental rights of Michael D. (Father) to his son Nicholas G. (born December 2000). Father appeals contending the court should have declined to terminate his rights based on the exception set forth in section 366.26, subdivision (c)(1)(A) (section 366.26(c)(1)(A)). That exception applies where “[t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

PROCEDURAL BACKGROUND AND FACTS

On July 30, 2002, a petition was filed alleging that Nicholas came within the jurisdiction of the juvenile court pursuant to section 300, subdivision (b). Specifically, it was alleged that Nicholas was in danger of serious physical harm due to his mother’s chronic and excessive abuse of alcohol. It was further alleged that Father was not a member of Nicholas’s household. On July 31, the juvenile court found that a prima facie showing had been made to support the petition. A psychological evaluation of Father was ordered.

Nicholas’s mother had a chronic alcohol abuse problem. She had four other children who were placed with relatives to avoid juvenile court action. Father only had sporadic contact with Nicholas. He reported that he sometimes saw Nicholas regularly, and other times he saw him less than once a month. According to the maternal grandmother (Grandmother), Father only saw Nicholas three times since his birth.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Father was in a car accident in 1990 which left him with a neurological impairment. He went through extensive rehabilitation after the accident. It took several years for Father to relearn how to do things. He is capable of new learning, but it is difficult for him. He would need ongoing training as Nicholas goes through different developmental stages and growth. Father's speech was slightly slurred or muffled, and he laughed at inappropriate topics. Father reported a history of substantial alcohol abuse, which ended approximately five years earlier. The social worker had to redirect Father while interviewing him, and he would stop midanswer and not say anything until redirected. He had a criminal history, and was on summary probation.

On August 21, 2002, the juvenile court found that Father is the father of Nicholas. That same day, the court found the allegations in the amended petition to be true. The social worker was ordered to provide services to the mother² and Father. Nicholas was placed with Grandmother.

In the social worker's six-month report, it was noted that Father had completed a parenting class at PRICE parenting. He had undergone a psychological evaluation with Dr. Ryan for dispositional purposes and he was participating in counseling with Hal Eurich. Visitation occurred weekly at the Department of Public Social Services' (Department) office or at Grandmother's home under her supervision. Nicholas was beginning to get to know Father during this time; however, Father's capacity to adequately parent Nicholas remained in question.

² The mother died on January 19, 2003, from a possible overdose of alcohol and/or drugs.

On March 18, 2003, the juvenile court continued services. Nicholas was moved to his maternal aunt's (Aunt) home on July 2. He was already very comfortable with her because of his prior relationship with her.

In the 12-month report, the social worker stated that Nicholas initially appeared apprehensive and frequently cried when visiting Father. Father visited Nicholas outside the scheduled visits so that he could interact with his son in a normal, everyday setting such as lunch, dinner, trips to the park, and grocery shopping. Father participated in picking up Nicholas from preschool on several occasions. However, during most of the visits, Father needed prompting to appropriately interact with Nicholas. Father preferred to interact with the adults, having little to say to his son.

Unable to understand Nicholas's developmental milestones, Father would get frustrated when Nicholas did not respond the way Father thought he should. During one visit, the Department's staff had to intervene and direct Father to comfort Nicholas and play with him. At other visits, Father had to be told to stop swearing and talking about his past behaviors of getting drunk and stealing in front of Nicholas. Father gets jealous when Nicholas shows any affection towards other adults.

Nicholas was very reserved around Father. Although he would eventually warm up to Father, in general, Nicholas played by himself during Father's visits. At times, Nicholas would completely ignore Father and he would refuse to engage in any interaction with him. During visits, Father was given parenting instructions; however, it was difficult for him to retain knowledge to anticipate Nicholas's needs. The assistant reported, "There is virtually no interaction between minor child and parent. . . . There are

no [bonding] signs between the two” Father tended to forget that Nicholas was around during the visits. Finding it was not in Nicholas’s best interests to be placed with Father, the social worker recommended termination of reunification services.

On September 23, 2003, the juvenile court terminated services to Father. Although Father filed a writ petition pursuant to California Rules of Court, rule 39.1B, he subsequently withdrew such petition.

In the section 366.26 report, the social worker stated that Father received bimonthly supervised visitation. He interacted with Nicholas, but Nicholas often had to be encouraged to interact with him. Nicholas often played by himself, but Father tried to engage him in play. Father had to be reminded that his language was inappropriate around Nicholas. He would comply, but would need reminding many times during the visit. Father often used the visitation time to complain about the Department.

Nicholas continued to reside with Aunt who planned to adopt him. He was doing well and had bonded to her, recognizing her as his primary caretaker. Aunt stopped initiating visits with Father outside of the scheduled visits because Father called her numerous times a week and was verbally abusive towards her. Father also made statements to the Aunt that he was going to take Nicholas from her. Aunt was fearful of having additional contact with Father.

The section 366.26 hearing was held on February 19, 2004. The social worker’s reports and the adoption assessment were received into evidence. Father did not present any affirmative evidence; however, he argued that his parental rights should not be terminated because he had maintained regular visitation and contact with Nicholas and a

beneficial relationship existed. After considering all the evidence, the juvenile court found by clear and convincing that Nicholas would likely be adopted, and that no exception to termination of parental rights applied. All parental rights were terminated. Father appeals.

SECTION 366.26(c)(1)(A) EXCEPTION

Father contends the juvenile court should have found the section 366.26(c)(1)(A) exception applicable so as to prevent the selection of adoption as the permanent plan for Nicholas. We disagree.

In reviewing a juvenile court's failure to apply the section 366.26(c)(1)(A) exception to preserve a parent's parental rights, the appellate court must "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) An appellate court can overturn an order terminating parental rights only if the order constitutes an abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Section 366.26(c)(1)(A) addresses one of five exceptional circumstances set forth in section 366.26, subdivision (c)(1), under which a juvenile court is authorized to decline

to terminate parental rights even though it has determined it is likely the child will be adopted. Absent application of one of the five exceptions, once a court has determined a child is adoptable, it “shall terminate parental rights and order the child placed for adoption.” (§ 366.26, subd. (c)(1).) The fact the court has continued the removal of the child from the parent’s custody and has terminated reunification services “shall constitute a sufficient basis for termination of parental rights” unless one of the five exceptions applies. (*Ibid.*)

Given the statutory preference for adoption once a proceeding has reached the section 366.26 hearing stage, a parent wishing to avoid termination of parental rights based on one of the exceptions enumerated in section 366.26, subdivision (c)(1), bears the burden of proving the exception applies. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

To avoid termination of parental rights by virtue of the exception set forth in section 366.26(c)(1)(A), “the parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy ‘a parental role’ in the child’s life. [Citation.]” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) Thus, the exception does not apply “when a parent has frequent contact with but does not stand in a parental role to the child.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) Further, the parent must show the benefit of continuing the relationship will outweigh the benefit of a permanent home with new, adoptive parents.

(*In re Jamie R.* (2001) 90 Cal.App.4th 766, 773; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1253.)

Accordingly, a parent may not invoke the exception simply by demonstrating some benefit to the child from a continued relationship or some detriment from termination of parental rights. (*In re Jasmine D., supra*, 78 Cal.App.4th 1339, 1349.) Instead, he or she must show the child would be “greatly harmed” if parental rights were terminated. (*In re Autumn H., supra*, 27 Cal.App.4th 567, 575.)

Given the legislative preference for adoption once reunification services have been terminated and a permanency planning hearing set, the courts have limited the application of section 366.26(c)(1)(A) to cases in which “exceptional circumstances” exist. (*In re Autumn H., supra*, 27 Cal.App.4th 567, 574.) “Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D., supra*, 78 Cal.App.4th 1339, 1350.) “Where a parent has failed to reunify with his or her child, and the juvenile court has found that the child is likely to be adopted, then the burden shifts to the parent to show exceptional circumstances. [Citation.] To require that the parent need only show some, rather than great, harm at this stage of the proceedings would defeat the purpose of dependency law, that is, the protection of ‘children who are physically, sexually or emotionally abused, neglected or exploited.’ [Citation.]” (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.)

Thus, the critical issue on appeal is whether Father met his burden to prove first that he occupied a parental role in his relationship with Nicholas, and second that the relationship was so beneficial to Nicholas that the benefit outweighed the benefits Nicholas would gain from a permanent and stable adoptive home. In support of his contention that he met this burden, Father relies principally on his record of consistent visitation as noted by the social worker, coupled with the juvenile court's recognition of the "valuable relationship [which] existed between Nicholas and [him]." Father quotes the court's observation: "Looking at all of the case in its totality, father does need to be commended. I would hope that he is able to keep contact in the future. I do believe that he loves this child and has an interest in the child." He further notes the court's referral of the matter to mediation for the purpose of attempting to facilitate a postadoption contact agreement between the two. Given this evidence Father argues that "[c]learly, there was a relationship between [he] and Nicholas which fit the definition of the type of relationship that must be preserved." We disagree.

Although the record shows that Father regularly visited his son, it also shows that the visits were supervised and never progressed to a point where Nicholas could stay overnight, or for weekends, with him. Thus, he failed to provide a parental role for his son. Moreover, the record fails to support any finding that Father could fill such role. According to the social worker's report, the interaction between Father and Nicholas was minimal. Nicholas had to be encouraged to interact with Father, and often would just play by himself. Father had to be reminded that his language was inappropriate around his son. While Aunt initially facilitated visits with Father outside those scheduled by the

Department, she eventually stopped because Father called her numerous times a week and was verbally abusive towards her.

While Father may have occupied a “pleasant place” in Nicholas’s life, he did not occupy a parental role. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) “This is insufficient to deny a child who cannot be returned to [his] parents the secure and permanent home decreed by the Legislature to be in [his] best interests. [Citation.]” (*Ibid.*)

Based on the above, Father has failed to carry his burden of proving that he had or would continue to maintain a relationship that benefited Nicholas and that justified application of the section 366.26(c)(1)(A) exception.

GUARDIANSHIP

In his reply brief, Father alternatively argues that legal guardianship is the best permanent plan for Nicholas because it would “have provided him with the same amount of permanence, given that he was placed with the maternal aunt. A legal guardianship would have given Nicholas the best of both worlds, since it is permanent until the age of 18, and such a plan would enable him to preserve his relationship with his father, even though he is struggling to rehabilitate himself from his brain injuries” We disagree. Family preservation is not a goal of the dependency statutory scheme once reunification services have been terminated, and certainly not a goal of permanency planning under section 366.26, where the interests of the children in permanency and stability are of paramount concern. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344.)

“‘The goal of permanency planning is to end the uncertainty of foster care and allow the dependent child to form a long-lasting emotional attachment to a permanent caretaker.’ [Citation.] Adoption is preferable to permanency plans of guardianship and long-term foster care. [Citation.]” (*In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1188.) Only four exceptions exist to termination of parental rights, and none of the four exceptions stands for the proposition that a parent’s rights should not be terminated if the prospective adoptive parents are relatives. (§ 366.26, subd. (c)(1)(A)-(D).) Father’s “best interest” argument is not based on any of the statutory exceptions to termination of parental rights. Absent any evidence of the four exceptions, the trial court did not err in terminating parental rights and choosing adoption as the permanent plan for Nicholas.

DISPOSITION

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

KING

J.